Supreme Court, U.S.
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No. 96-1214

In The

# Supreme Court of the United States

October Term, 1996

JEFFREY CRANE,

*Petitioner,*

v.

OLSTEN STAFFING SERVICES and LIBERTY MUTUAL,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Respondents disagree with the argumentative manner in which the Petitioner phrases the questions presented for review. According to the main argument heading in his brief before the Florida First District Court of Appeal, the question presented was:

> Whether Sections 440.02(1) and 440.09, Florida Statutes (1993) is subject to and comports with the requirements of Title I of the Americans with Disabilities Act?

The fourth question listed in the Petition raises an issue regarding the Americans with Disabilities Act, Title II, 42 U.S.C. § 12132 et seq. As specified in his brief before the Florida First District Court of Appeal, the Petitioner's argument in the lower court was limited to Title I of the Americans with Disabilities Act.

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## OPINION BELOW

The appendix to the Petition gives no indication of the issues which were presented to or considered by the Florida First District Court of Appeal in the proceeding below. Respondents will stipulate that the issue presented to the lower court was stated by the Petitioner in his initial brief in the following manner:

> Whether Sections 440.02(1) and 440.09, Florida Statutes (1993) is subject to and comports with the requirements of Title I of the Americans with Disabilities Act?

## BASIS FOR JURISDICTION

Respondents disagree with the statement by Petitioner that the decision of the Florida Supreme Court in *Jenkins v. State,* 385 So. 2d 1356 (Fla. 1980), precludes review by the Florida Supreme Court. The decision in *Jenkins v. State* applies only to decisions which read in their entirety "per curiam affirmed." 358 So. 2d at 1359. The decision in the instant case stated:

> Per curiam.
>
> Affirmed. *See Hensley v. Punta Gorda, No. 96-358 (Fla. 1st DCA Jan. 6, 1997).*
>
> (Petitioner's App. at 11).

In *Jollie v. State,* 405 So. 2d 418 (Fla. 1981), the Florida Supreme Court held that this type of decision by a District Court of Appeal allows the Supreme Court to exercise its jurisdiction where the cited case is either pending review in or has been reversed by the Florida Supreme

Court. *Id.* at 420. The undersigned attorney acknowledges that the time for seeking review in the Florida Supreme Court in *Hensley* expired without the filing of a petition for discretionary review.

For the convenience of the Court, Respondents point out that counsel for the Petitioner filed an essentially identical petition in this Court in *Kienzle v. Englewood Disposal Co.*, ___ U.S. ___, 117 S.Ct. 766 (Case No. 96-720, 1997).

## ADDITIONAL STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, Title I, 42 U.S.C. §12111(8), provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. §12111(8).

Florida Workers' Compensation Law defines "disability" in the following manner:

> "Disability" means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.
>
> Section 440.02(11), Florida Statutes (1995).

## STATEMENT OF THE CASE

In the Petition, significant facts were omitted. Petitioner filed a claim for temporary total disability or temporary partial disability benefits under Florida's Workers' Compensation Law. (App. 2). There is no indication in the record that the Claimant made any attempt to establish that he could perform the essential functions of the employment position, as required to establish that he is a "qualified individual with a disability" under 42 U.S.C. §12111(8).

## ARGUMENTS FOR DENYING THE PETITION

### INAPPROPRIATE CHOICE OF FORUM.

Petitioner chose to bring his constitutional claim in an administrative setting. As the Judge of Compensation Claims stated in the compensation order, he had no power, authority or jurisdiction to determine whether the workers' compensation statute violates any state or federal statutes or constitutional rights or remedies. (App. 5). Nonetheless, the First District Court of Appeal has stated that it may be appropriate for an appellate court to allow this type of question to be raised for the first time on appeal from the final order of the administrative

judge. *Barry v. Burdines*, 667 So. 2d 241 (Fla. 1st DCA 1995), *approved on certified question*, 675 So. 2d 587 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 390 (1996). A review of the circumstances in this case indicates that these issues do not lend themselves to consideration for the first time on appeal to the District Court.

In *Ortega v. Owens-Corning Fiberglas Corp.*, 409 So. 2d 530 (Fla. 1st DCA 1982), an employee sued his employer in Circuit Court, the court of general jurisdiction, seeking a declaratory judgment that Florida's Workers' Compensation Law is unconstitutional on various grounds and demanding money damages for injuries alleged to have been caused by his employer's negligence. The Circuit Court dismissed the complaint based on the finding that the constitutional questions could be heard by the District Court of Appeal in the natural course of the administrative claim for workers' compensation benefits. 409 So. 2d at 531. The trial court concluded that it should abstain from considering the constitutional claims. *Id.*

On appeal, the appellate court held that the trial court had improperly dismissed the complaint for declaratory relief. *Id.* at 531-32. As one ground for the reversal, the Court stated:

> First, chapter 120 offers factfinding and other resources to a district court of appeal, for review of constitutional as well as non-constitutional issues in the interpretation of statutes, which simply are unavailable in chapter 440 appeals to this Court. Section 440.021, Florida Statutes (1981), exempts proceedings on workers' compensation claims from chapter 120. Therefore, while deputy commissioners function only as

> adjudicative officers in a traditional sense, a chapter 120 agency may be required to explore the factual assumptions on which its accustomed interpretation of a statute is predicated, if that may help the agency or court avoid a possibly unconstitutional interpretation. *Rice*, 386 So. 2d at 850. In respect to non-constitutional questions, too, such an agency may be required to adduce conventional proof in support of its preferred policy choice within the statutory bounds, preliminary to a district court deciding the issue as a matter of law or deferring to the agency in the formulation of policy. *E.g., Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013, 1018 (Fla. 1st DCA 1981); *School Board of Leon County v. Hargis*, 400 So. 2d 103 (Fla. 1st DCA 1981). No comparable resources are available to this Court in reviewing latent constitutional questions on workers' compensation appeals from orders of the deputy commissioners.
>
> 409 So. 2d at 532.

The second ground for reversing the dismissal was the fact that the Claimant was assailing Chapter 440 as a whole, and asked for nothing that a Deputy Commissioner was empowered to grant. 409 So. 2d at 532.

The instant case presented no issues which could be determined by the Judge of Compensation Claims. The parties presented a set of stipulated facts (App. 8-10), which established as a matter of law that the Petitioner's injury is excluded from coverage under the Florida Workers' Compensation Law. (App. 4). On appeal, the Claimant did not argue that the Judge of Compensation Claims committed any error. Instead, the sole issue raised

on appeal was an issue which was not presented to, litigated before or considered by the Judge of Compensation Claims in entering the compensation order. Any constitutional questions in this case, like the constitutional question in *Ortega,* are latent. These circumstances provided no basis for determining any constitutional questions because the nature of the forum precluded the parties from presenting a complete record for determination of those questions.

The proper forum for determining this type of constitutional question would have been a state circuit court or a federal district court. Those courts, unlike the District Court of Appeal, have the ability to establish a record in order to make an in-depth inquiry into constitutional challenges. If the Claimant in the instant case had brought an action for declaratory relief instead of seeking workers' compensation benefits which are clearly unavailable under the law, the trial court would have been able to consider any and all proofs which would be relevant to the issues which were raised in the instant case for the first time on appeal.

The reason the Petitioner chose the workers' compensation forum instead of filing an action for declaratory relief is obvious. The essence of the Petitioner's arguments is that there is no evidence that the statute is constitutional. Of course, there is no evidence that the statute is unconstitutional, since the Judge of Compensation Claims never considered any constitutional questions.

STANDING TO ASSERT ADA CLAIM.

A basic requirement for any claimant under the ADA is that he or she must be a "qualified individual with a disability." 42 U.S.C. §12112(a). The act defines this limitation in the following manner:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
>
> 42 U.S.C. §12111(8).

There is no indication in the record that the Petitioner made any effort to establish that he is a qualified individual with a disability. In fact, in the workers' compensation proceeding, the Claimant was seeking temporary partial or temporary total disability benefits. His condition was asserted to be both temporary and disabling as defined under the Workers' Compensation Law. In asserting that he is either totally or partially disabled in the workers' compensation proceeding, the Claimant essentially admits that he is not a qualified individual with a disability for the purposes of asserting a claim under the ADA.

The Third Circuit Court of Appeals considered a similar situation in *McNemar v. The Disney Store, Inc.*, 91

F.3d 610 (3d Cir. 1996), *petition for certiorari filed*, 65 USLW 3467 (No. 96-966, Dec. 16, 1996). In *McNemar*, the injured worker had attempted to state a claim of discrimination under Title I of the ADA. The Third Circuit Court agreed with the trial court's summary judgment, which had concluded that the claimant was judicially estopped from contending that he is a qualified person with a disability for the purposes of asserting an ADA claim. *Id.* at 619. Before the Social Security Administration, the claimant and his physicians had certified under penalty of perjury that he was totally and permanently disabled. *Id.* at 618. He made similar representations in applying for state disability benefits. *Id.* When he applied for an exemption from making payments on his student loans, he represented to the state that he was unable to work and earn money. *Id.* The Court stated:

> Thus, McNemar has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work – while now, in claiming relief under the American Disabilities Act, he states that he is "a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job" as contemplated by 42 U.S.C. §§12111(8), 12112(a).
>
> *Id.* at 618.

The Court pointed out that a person unable to work is not intended to be, and is not, governed by the ADA. The trial court had determined that the Claimant had failed to establish a prima facie case of discrimination under the statutory criteria because he admitted he was not qualified to perform his job as assistant manager at Disney,

and that he is thus judicially estopped from arguing that he is now "qualified" under the ADA. *Id.* at 619. Under the undisputed facts, the Third Circuit Court concluded that it would not disturb that determination. The Court recognized that a claimant may be forced to choose between seeking disability benefits and suing under the ADA. *Id.* at 620. Nevertheless, the Court concluded that nothing in the law permits one to undermine the integrity of the judicial system " . . . by playing fast and loose with the courts by asserting inconsistent positions." *Id.* (citation omitted).

The Petitioner in the instant case made no attempt to establish that he is a qualified individual with a disability. He did not attempt to show that he can perform the essential functions of the employment position which he holds or desires. A review of the petition reveals that the Petitioner never even represents to this Court that he is a qualified individual with a disability. He has not established standing to raise an ADA claim.

The Ninth Circuit Court of Appeals considered a similar standing problem in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). In *Kennedy*, the claimant was diagnosed with chronic fatigue syndrome, and was certified by her physician as disabled from work. *Id.* at 1479. On the same day her physician signed a disability note stating that she was disabled from work, the claimant signed an application for state disability benefits, and her supervisor called her at home and informed her that she was fired. *Id.* at 1480. The District Court determined that the claimant's deposition testimony that she was capable of working was belied by her detailed and definite sworn statement to the contrary on her disability benefit claim

forms. *Id.* The District Court also determined that the claim form statements and the physician's opinion established that the claimant was totally disabled, and thus there was no reasonable accommodation the employer could have made which would have enabled her to perform her job. The employer's motion for summary judgment on the ADA claim was granted. *Id.*

In reviewing the summary judgment, the Ninth Circuit Court first noted that an ADA claimant must establish that he or she is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position which the individual holds or desires. *Id.* at 1481. A plaintiff bears the burden of demonstrating that she can perform the essential functions of her job with or without reasonable accommodation. *Id.* Based upon the fact that there was no genuine dispute of the fact that she was totally disabled from performing her job, the Ninth Circuit affirmed the summary judgment on the ADA claim. The Petitioner in the instant case has made no effort to establish that he has standing to assert a claim under the ADA. As noted in *Kennedy v. Applause,* it was his burden to demonstrate that he could perform the essential functions of his job with or without reasonable accommodation. There is no indication in the record that he made even the slightest attempt to carry this burden. The Petitioner chose an inappropriate forum for establishing an ADA claim, and made no effort to establish the elements of an ADA claim in that forum. He presents no justiciable issues to this Court for review on certiorari.

PEACEFUL CO-EXISTENCE.

The relationship between the Florida Workers' Compensation Law and the ADA was considered by the Florida Supreme Court in *Barry v. Burdines*, 675 So. 2d 587 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 390 (1996). In *Barry*, the claimant was injured at work and received temporary total disability benefits for two and a half months, at which point he had reached "maximum medical improvement." *Id.* at 588. He returned to work at a limited capacity and began receiving wage loss benefits based on an impairment rating of nine percent. *Id.* at 588-89. He then filed a workers' compensation claim, asserting that Section 440.15(3)(b)4.D., Florida Statutes (1991), violates Title I of the ADA because it segregates disabled individuals arbitrarily and deprives them of an individualized assessment of their disabilities. *Id.* at 589.

The Florida Supreme Court disagreed with the argument. The Court noted that the ADA and the Workers' Compensation Law were designed to fulfill different goals. *Id.* The ADA was intended to prevent the prejudicial treatment of disabled persons and to allow them to compete in the workplace. *Id.* It does not guarantee equal rights to workers' compensation benefits for all handicapped persons regardless of their varying abilities to work. *Id.* It simply requires the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of impermissible classifications. *Id.* The Workers' Compensation Law, on the other hand, was created to provide an injured employee with an efficient delivery of disability and medical benefits at a reasonable cost to the employer. *Id.* It imposes no barriers which are prohibited

by the ADA, and the criteria employed by the Workers' Compensation Law are not inadequate, arbitrary or discriminatory. *Id*. The system set forth in the statute is a fair and efficient method for handling the large volume of workers' compensation claims, and the assessment procedure is sufficiently individualized to satisfy the ADA. *Id*. The Court concluded that the statute comports with ADA requirements. *Id*.

The ADA and the Florida Workers' Compensation Law exist in different spheres. The Workers' Compensation Law provides benefits to a person who can establish that he or she was injured on the job and that he or she cannot work. The ADA functions to prevent an employer from discriminating against a person with a disability when that person can establish that he or she can perform the essential functions of the job with or without reasonable accommodation. The Petitioner has no standing to present the argument he has presented, and the argument is without substance in any event.

## CONCLUSION

Respondents, Olsten Staffing Services and Liberty Mutual Insurance Company, request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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